



April 29, 2005

Eric Feller
Commission Counsel
Commission on State Mandates
980 9th Street, Suite 300
Sacramento, CA. 95814

Re: Denial of Appeal of Executive Director's Decision on the
Inapplicability of the California Code of Regulations, Title 2,
Section 1188.4 to Reconsideration of Decision 04-RI-3929-05

Dear Mr. Feller:

The Association of Bay Area Governments (ABAG) hereby requests pursuant to Title 2 California Code of Regulations Section 1188.4 (hereafter "section 1188.4") that the Commission on State Mandates (Commission) reconsider its Denial of Appeal of Executive Director's Decision on the Inapplicability of California Code of Regulations, Title 2, Section 1188.4 to the Reconsideration of Decision 04-RI-3929-05 [Cal. Code of Regs., Tit. 2, § 1181, Subd. (C)] (Decision of March 30, 2005) for the reasons set forth in this letter.

First, California Government Code section 17525(a) requires the Commission to be comprised as follows:

There is hereby created the Commission on State Mandates, which shall consist of seven members as follows:

- (1) The Controller.
- (2) The Treasurer.
- (3) The Director of Finance.
- (4) The Director of the Office of Planning and Research.
- (5) A public member with experience in public finance, appointed by the Governor and approved by the Senate.
- (6) Two members from the following three categories appointed by the Governor and approved by the Senate, provided that no more than one member shall come from the same category:
 - (A) A city council member.
 - (B) A member of a county or city and county board of supervisors.
 - (C) A governing board member of a school district as defined in Section 17519.

At the March 30 meeting at which the above-referenced decision and the substantive reconsiderations were ostensibly made, none of the individuals seated as the members designated under section 17525(a)(1)-(3), inclusive, was the Controller, Treasurer or Director of Finance for the State of California. There are no provisions in the Commission's enabling legislation or its regulations for alternates to, or designees in lieu of, the public official named by statute. Therefore, the individuals seated as surrogates for the Controller, Treasurer or Director of Finance were not entitled to hear, consider or vote on the matters presented on March 30, 2005.

Second, as a separate and independent basis for reconsideration, ABAG urges the Commission to accept the compromise offered at oral argument viz, require five affirmative votes to overturn prior test claims 3929, 3760, 3916 and 3759 pursuant to Section 1188.4(g)(2). By so doing, the Commission accommodates the legislative directive that it reconsider the prior test claims. At the same time, the Commission treats a reconsideration undertaken pursuant to legislation on par with one requested by an interested party by subjecting both to the supermajority requirement.

The original and supplemental staff analysis on this issue urged the Commission to ignore the supermajority vote requirement for several reasons. ABAG has previously responded to these analyses. At this time, ABAG takes further issue with the comparison of section 109 of SB 1102 to judicial review of the Commission's action under Government Code Section 17559. This comparison is unsound. The courts have the power to overturn or modify a Commission decision. This power of the reviewing court, of necessity, trumps any procedural or vote requirement.

The Legislature does not have the power to overturn or modify Commission decisions. For the purposes of this analysis only, ABAG accepts the assertion that the Legislature has the power to require the Commission to reconsider prior decisions and the Commission staff analysis that the requirements of sections 1188.4(a), (c), (f) and (j) must give way to the legislative direction to reconsider claims 3929, 3760, 3916 and 3759. However, none of the provisions of section 1188.4(g) impedes in any way the Commission taking up the reconsideration. These provisions only affect the manner in which the reconsideration is conducted and decided. In fact, the Commission observes all the requirements articulated in 1188.4(g)(1). The Commission only breaches the supermajority vote requirement of section 1188.4(g)(2) – a section that affects not *whether* the Commission will reconsider a prior decision but the *likelihood* of a particular *result*. Such evasions run counter to the basic tenets of procedural and substantive due process.

Respectfully submitted,



Kenneth K. Moy

cc: Henry L. Gardner
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